



## A Guide to VA Benefits for Family Caregivers and the *Beaudette* Class Action

Presented by: Renée Burbank, NVLSP Director of Litigation

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### Presenter

## Renée Burbank



- NVLSP Director of Litigation
- Former Clinical Teaching Fellow at Yale Law School's Veterans Legal Services Clinic
- Former DOJ Litigator

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## Agenda

- What is the Program of Comprehensive Assistance for Family Caregivers (PCAFC)?
- Who is eligible for PCAFC and how do they apply?
- How can a Veteran and caregiver appeal a PCAFC decision?
- What pending litigation and other developments may affect Veterans and caregivers' rights?

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## Survey #1

Have you represented someone in a PCAFC application and/or appeal before?

- A. Yes, both application and appeal
- B. Yes, only application(s)
- C. Yes, only appeal(s)
- D. No

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## What is the PCAFC?

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## Overview of PCAFC

- Only one part of Caregiver Support Program
- Enacted in 2010 to provide benefits to caregivers of post-9/11 disabled Veterans with serious injuries
- Eligibility expanded by 2018 MISSION Act
  - As of 10/1/2020: Vets discharged on or before 5/7/1975
  - As of ????: all Veterans
- July 1, 2020: Reg (85 Fed. Reg. 46,296) overhauled eligibility

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## Benefits

- **Monthly stipend**

Pre-Oct 2020	Post-Oct 2020
Based on “tier” (3 tiers)	Based on “level” (2 levels)
Based on Bureau of Labor Statistics data	Based on Federal Government pay scale (GS scale)

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## Benefits (cont'd)

- Level 2 (“inability to self-sustain”): 100% of GS4 Step 1, with locality pay
- Level 1: 62.5% of GS4 Step 1

SALARY TABLE 2022-BA  
INCORPORATING THE 2.2% GENERAL SCHEDULE INCREASE AND A LOCALITY PAYMENT OF 28.94%  
FOR THE LOCALITY PAY AREA OF RALEIGH-DURHAM-CHAPEL HILL, NC  
TOTAL INCREASE: 2.80%  
EFFECTIVE JANUARY 2022

Annual Rates by Grade and Step

Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
1	\$ 24,306	\$ 25,214	\$ 26,025	\$ 26,833	\$ 27,643	\$ 28,417	\$ 28,020	\$ 29,728	\$ 29,761	\$ 30,418
2	27,433	28,083	28,993	29,761	30,097	30,982	31,868	32,753	33,638	34,524
3	30,431	30,929	31,927	32,925	33,923	34,920	35,918	36,916	37,913	38,911
4	<b>33,690</b>	34,719	35,839	36,959	38,079	39,199	40,319	41,439	42,559	43,679
5	37,927	38,845	40,098	41,351	42,604	43,856	45,109	46,362	47,615	48,868
6	43,222	44,342	45,728	47,114	48,500	49,886	51,272	52,658	54,044	55,430

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## Benefits (cont'd)

- Travel expenses (including lodging and per diem while accompanying the veterans undergoing care)
- Mental health services and counseling
- VA Caregiver training
- Respite care
- Access to CHAMPVA (if qualified)

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## History of Problems

- Inconsistencies across VISNs

**VA Stations Continue To Shed Caregivers**

Stays in the VA caregiver program vary from 0% to 46% of the eight stations that use the greatest net loss in 2017. The bars at each table represent an estimated significantly lower than in 2018.

VISN	CAREGIVERS			CHANGED SINCE 2018
	2016	2017	APRIL 2018	
Eastlands (D.C. VISN)	570	274	229	-1,156 (-67%)
Northern Indiana (WACO Phoenix, IN2)	224	36	36	-1,166 (-87%)
Region 4 (Central WACO Charleston, SC2)	187	91	13	-1,154 (-86%)
South Texas Veterans HCS (Spokane and San Antonio)	342	127	49	-1,362 (-80%)
VA Puget Sound HCS (Seattle)	201	138	118	-1,192 (-84%)
Piedmont WACO (Portland, OR2)	172	36	38	-1,113 (-87%)
Charley National WACO (Aurora, OR)	188	36	18	-1,346 (-89%)
Henry W. Turner Memorial (Chattanooga, TN)	130	87	182	-1,247 (-90%)

Quill Lawrence, VA's Caregiver Program Still Dropping Veterans With Disabilities  
May 21, 2018  
<https://www.vva.org/2018/05/21/18733148/vas-caregiver-program-still-dropping-veterans-with-disabilities>

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## History of Problems (cont'd)

- A&C decisions
  - VA suspends discharges & decreases Dec 2018
- Delays
  - MISSION Act directed expansion by 10/1/19
- VA says no appeal rights b/c clinical program
  - Changes w/ *Beaudette* decision 4/21

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## Who is eligible for PCAFC and how do they apply?

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## Eligibility

7 eligibility requirements

1. **Vet or service member** undergoing medical discharge
2. **Serious injury** incurred or aggravated in the line of duty:
  - 70% SC and
  - On or after 9/11/2001; or
  - On or before 5/7/1975

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## Eligibility (cont'd)

3. Needs in-person personal care services for at least **six continuous months** b/c of:
  - An **inability to perform ADL**; **OR**  
*points system → 100% inability (need 3 & "fully dependent" for lvl 2)*
  - **Need for supervision, protection or instruction**  
*Daily pattern (lvl 1) or continuous (lvl 2)*

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## Eligibility (cont'd)

4. In best interest of individual to participate
5. Care would be provided by **family caregiver**
6. Receives care at home
7. Has ongoing care from Primary Care Team

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**Reassessments** 

- Expansion + contraction
- Legacy participant reassessments
  - 1yr expanded to 2yr
- Suspension to 10/2022, 60-day “due process” period, and 90-day extension

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**Survey #2 Eligibility Quiz** 

Vet: 60% SC; discharged 1/6/2006; unable to ever perform 2 ADLs; needs 6+mos. of care  
 CG: adult girlfriend (not spouse) who does not live w/ Vet  
 Are they eligible?

- A. Yes, Level 1
- B. Yes, can't tell what level
- C. It depends on whether CG willing to live with Vet
- D. No

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- C. It depends on whether CG willing to live with Vet
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**Survey #3:  
Eligibility Quiz**



Vet: 80% SC; discharged 1/6/2006; unable to ever perform 2 ADLs; needs 6+mos. of care  
CG: adult girlfriend (not spouse) who does not live w/ Vet  
Are they eligible?

- A. Yes, Level 1
- B. Yes, Level 2
- C. It depends on whether CG willing to live with Vet
- D. No

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**Survey #3:  
Eligibility Quiz**



Vet: 80% SC; discharged 1/6/2006; unable to ever perform 2 ADLs; needs 6+mos. of care  
CG: adult girlfriend (not spouse) who does not live w/ Vet  
Are they eligible?

- A. Yes, Level 1
- B. Yes, Level 2
- C. It depends on whether CG willing to live with Vet
- D. No

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**By the numbers**



- In Sept 2021, **33,000** individuals enrolled in the program (19,800 legacy)
- **~400k** total applicants (Veteran + CG)
- **97,100** applications from 10/1/20 to 8/1/21
- **88%** denial rate for new applications
- VA est. **1 in 3** legacy participants will be removed
- Est. **40,368** BVA appeals FY2022

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--- Instrument/Activity Name --- VEST DATE: 02/28/2022  
 SOCIAL TITLE: [REDACTED] SOCIAL SECURITY NUMBER (S) [REDACTED]  
 STARTED DATE: [REDACTED] START DATE: [REDACTED]  
 DATE OF BIRTH: [REDACTED] BIRTH DATE: [REDACTED]  
 ADDRESS: [REDACTED] EXT OFFICE: [REDACTED]  
 SUBJECT: [REDACTED]

Veteran Eligibility Assessment For the Program of Comprehensive Assistance For Family Caregivers

\*\*\*\*\*NEED MEET ALL SETS FROM REQUIREMENTS \*\*\*\*\*

1. Is the individual history of a Veteran or of a member of the Armed Services who has been found unfit for duty due to a medical condition by their Service's Medical Evaluation Board and has been issued a date for medical discharge from the Armed Forces?

Yes

2. Does the Veteran or Servicemember have a medical injury (including traumatic brain injury), psychological trauma, or other mental disorder, diagnosed or diagnosed in the line of duty in the active military, naval, or air service on or after September 11, 2001?

Yes

3. Does the medical injury render the Veteran or Servicemember in need of personal care services from another individual (a caregiver) for a minimum of 4 consecutive months?

Yes

The following personal care services apply to the Veteran:  
 - An inability to perform one or more activities of daily living  
 - A need for supervision or restriction based on cognition or behavior or [REDACTED]

4. Has a clinical determination (authored by the individual's primary care provider) been made that it is in the best interest of the Veteran or Servicemember to participate in the program?

Yes

Participation in the program will:  
 - Substantially reduce the eligible Veteran's ability to live safely as a home resident  
 - Impact the Veteran's potential progress in rehabilitation, if such potential exists  
 - Create an environment that supports the health and well-being of the Veteran

5. Will the family caregiver provide personal care services that will not be unduly burdensome and regularly provided by or through another individual or entity?

Yes

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Sample excerpt

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Instrument Part A - ADLs:

<b>EATING</b> (1) Eating: The ability to use suitable utensils to bring food and/or liquid to the mouth and swallow food and/or liquid once the meal is placed before the person.	<input type="radio"/> Independent <input type="radio"/> Setup or cleanup assistance <input type="radio"/> Supervision or touching assistance <input type="radio"/> Partial/moderate assistance <input type="radio"/> Substantial/maximal assistance <input type="radio"/> Dependent <input type="radio"/> Person refused <input type="radio"/> Not applicable - Person does not usually do this activity <input type="radio"/> Not attempted due to short-term medical condition or safety concerns
<b>GROOMING</b> (2) (a) Oral Hygiene: The ability to use suitable items to clean teeth. (Dentures (if applicable): The ability to insert and remove dentures into and from the mouth, and manage denture soaking and rinsing with use of equipment.)	<input type="radio"/> Independent <input type="radio"/> Setup or cleanup assistance <input type="radio"/> Supervision or touching assistance <input type="radio"/> Partial/moderate assistance <input type="radio"/> Substantial/maximal assistance <input type="radio"/> Dependent <input type="radio"/> Person refused <input type="radio"/> Not applicable - Person does not usually do this activity <input type="radio"/> Not attempted due to short-term medical condition or safety concerns
(2) (b) (i) Upper Body: The ability to dry the hands.	<input type="radio"/> Independent <input type="radio"/> Setup or cleanup assistance <input type="radio"/> Supervision or touching assistance

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How to appeal

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## Appeal Rights

- *Beaudette* Overview
- Appellate Options
- Best Practices
- Unresolved Issues

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## *Beaudette*

- Jeremy and Maya Beaudette
- CAVC mandamus filed. Decision April 2021
- Class Definition:
  - “all claimants who received an adverse benefits decision under the Caregiver Program, exhausted the administrative review process within the VHA, and have not been afforded the right to appeal to the Board of Veterans’ Appeals.”
- But relief & notice beyond class members

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## Implementation of *Beaudette*

- Notice to everyone: starting Nov 17, 2021
  - ~200k sent as of Feb 14, 2022
- Appeal rights w/ new decisions starting Sept 28, 2021
- New Forms: 10-305, 10-306, 10-307, and recent change to 10182

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## Survey #4

CG of post-9/11 Vet comes to you with a *Beaudette* notice in hand. They were denied PCAFC in 2017, but don't have copy of decision. They want to appeal to BVA.

What do you do?

- A. Have CG & Vet **EACH** file Form 10-306
- B. Have CG & Vet **BOTH** file Form 10-307
- C. Request VHA medical file access (CAPRI or through Vet/CG)
- D. All of the above

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## Survey #4

CG of post-9/11 Vet comes to you with a *Beaudette* notice in hand. They were denied PCAFC in 2017, but don't have copy of decision. They want to appeal to BVA.

What do you do?

- A. Have CG & Vet **EACH** file Form 10-306
- B. Have CG & Vet **BOTH** file Form 10-307
- C. Request VHA medical file access (CAPRI or through Vet/CG)
- D. All of the above

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## Best Practices

- Check date of decision!!
  - What if don't know date and VA non-responsive?
- Multiple decisions?
  - VHA processing not in VBMS – important to keep track
- Medical file review is critical
  - Consider filing supplemental claim or new evidence
- Make process arguments as well as substantive

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**Unresolved Issues** 

- Former caregivers; deceased claimants
- Simultaneous appeals processes
- New evidence or failure to consider evidence already on record?
  - Meeting supp claim new and relevant standard
- Problems related to Form 10-306
- Due process on reductions/removals when on appeal
- Right to 8-point letter
- Lots & lots more...

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**Current Developments**

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**Developments to watch** 

- *Beaudette* appeal
- Veteran Warriors rulemaking challenge
- Pending rulemaking petition
- Congressional inquiries
- Pending legislation

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Questions? 



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Upcoming webinars 

April 2022:

Everything You Need to Know about Total Disability Ratings Based on Individual Unemployability

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Library of Past Webinars 

- Previous NVLSP webinars are available [here](https://productsbynvlsp.org/product-category/on-demand-webinars-vso-training/) (<https://productsbynvlsp.org/product-category/on-demand-webinars-vso-training/>)
- **Webinars are available for 72 hours after purchase**
- **Topics include:**
  - **Effective Strategies for Written and Oral Advocacy Before the VA**
  - **Ensuring the VA Properly Evaluates Joint Disabilities**
  - **Establishing Service Connection for Hearing Loss and Tinnitus**

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**NVLSP**  
**VA Benefit Identifier**

- Questionnaire/App: Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- 3 WAYS to Access:  
**NVLSP Website**  
Download on the **App Store** ANDROID APP ON **Google play**

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- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at [richard@nvlsp.org](mailto:richard@nvlsp.org)

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